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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

No. 84-115

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SUPREME COURT, U.S.

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

MARIO LOPEZ, et al., RESPONDENTS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF RESPONDENTS

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Pursuant to Rule 22.6 of the Rules of this Court, respondents submit a supplemental brief in light of petitioner's reply brief received by respondents on November 26, 1984. Respondents will not reiterate the arguments in their brief in opposition, but some response is called for with respect to arguments contained in petitioner's reply brief.

A.

Petitioner errs in stating that this case is "for present purposes" identical to Heckler v. Kuehner, No. 83-1593. Reply brief for the Petitioner (Reply Brief), p. 1. With respect to the effect of the Social Security Disability Benefits Reform Act of 1984, Pub. Law No. 98-460, 98 Stat. 1794 et seq. (1984 Act), on her petition for a writ of certiorari, there is a critical difference between the case at bar and Kuehner.

Kuehner involved an appeal from a district court decision dismissing on jurisdictional grounds Kuehner's cause of action. See, 547 F.Supp. 49 (E.D. Pa. 1982). The decision of the Third Circuit reversing the district court constituted a final disposition on the merits of issues directly affected by the 1984 Act. See, Kuehner v. Heckler, 717 F.2d 813 (3rd Cir. 1983). The circumstances were similar to those in Beltran v. Myers, 451 U.S. 625 (1981), where the Ninth Circuit had entered what otherwise would have been a final judgment concerning an issue affected by intervening legislation passed while a petition for certiorari was pending. The Court held that, in such circumstances, it was appropriate to grant the petition for certiorari, vacate the Ninth Circuit decision, and remand to the Ninth Circuit for "reconsideration" in light of the intervening legislation. Id. at 628-629.

By contrast, in the case at bar the Secretary sought this Court's review only of the scope of preliminary relief ordered by the district court. See, Petition for a Writ of Certiorari, p. 17. Because no final judgment has been entered by the Ninth Circuit or the district court, no action is required by this Court to ensure that the intervening legislation is given effect. Any final relief ordered by the

district court will necessarily take into account the intervening legislation. See, e.g., U.S. v. Schooner Peggy, 5 U.S. (1 Cranch) 103 (1801). In this case, as in Beltran, this is not the appropriate Court initially to consider the effect of the intervening legislation. Rather, the effect of the 1984 Act should be determined, in the first instance, by the district court via motions to modify the preliminary injunction presently in effect. The Secretary herself recognized that "[t]he duty of ... the district court is to apply the 1984 Act to all pending cases...." Reply Brief, p. 7, n. 5.

B.

Petitioner purports to request this Court to enter an order "in the same manner" as it disposed of the petition in Heckler v. Kuehner, No. 83-1593. Reply Brief, p. 8. However, she proposes a mandate that would specifically vacate the judgment insofar as it affirms jurisdiction over "any class member who received an administrative decision prior to December 6, 1982, that his disability had ceased and who did not seek further administrative or judicial review of that decision within 60 days." Id. Thus, rather than an order simply vacating the decision of the Ninth Circuit and remanding the case for reconsideration in light of the 1984 Act as, for example, the Court did in Beltran v. Myers, supra, the Secretary requests that the Court reach out to issue what could be construed as a one-sentence opinion on a question -- the jurisdictional aspects of the 60-day rule -- that is no longer at issue in this case and that has never been fully briefed before this Court. Such an action by the Court would be wholly gratuitous. The Secretary made no such request in Kuehner, and there is no authority for issuing what would be, in effect, an advisory opinion stating what the Secretary speculates the

Court would have held had the 1984 Act not rendered the issue moot.

The Secretary seeks from this Court, in a summary order, comment on an issue now moot. Congress made clear in the 1984 legislation that all members of certified classes, whether or not they had exhausted, and whether or not they had pursued judicial or administrative remedies within sixty days, were eligible to be reinstated and reviewed under new standards. 1984 Act, § 2(b)(3). This the Secretary has acknowledged. See, Supplemental Brief for the Petitioners in Heckler v. Kuehner, No. 83-1593, p. 7. Nonetheless, she seeks a ruling from this Court on a matter she has admitted will affect no class member. Because the 60-day issue is moot, inclusion of the language proposed by the Secretary would serve only to invite confusion as to the Court's meaning.

The significance of the Secretary's disingenuous attempt to secure a precedential order without presenting to this Court full briefing, argument, or indeed, a live case or controversy, is heightened by the inconsistencies of the Secretary's position with the decisions of this Court. As we noted in summary fashion in our brief in opposition, this Court has repeatedly held that the 60-day time limit is not a jurisdictional bar. Weinberger v. Salfi, 422 U.S. 749, 763-64 (1975) and Mathews v. Eldridge, 429 U.S. 319, 328 n. 9 (1976). (Brief in Opposition, p. 4.) The consequence if this Court adopted the government's position in this unusual instance of executive branch defiance of judicial precedent, would be to oust the federal courts from adjudicating all claims against nonacquiescence (brief in opposition at n. 3) -- something the Secretary in her reply brief makes no attempt to deny. The Secretary's speculation about the meaning of this Court's action in twice granting "a stay of the implementation of the

district court's preliminary injunction as applied to these class members" (Reply Brief, p. 7) is surely an insufficient predicate for the advisory relief the Secretary urges on the Court. This Court should therefore decline the Secretary's invitation to address so significant a question by way of summary disposition, particularly when the impact of such a ruling would affect no class member now before the Court.

CONCLUSION

Respondents urge that certiorari be denied. If the Court grants certiorari, the matter should be remanded with no reference to the "jurisdictional" issues now rendered moot by the 1984 Act. Respondents suggest that the Court enter the following order in this case:

> The Petition for a Writ of Certiorari is granted. The decision of the United States Court of Appeals for the Ninth Circuit is vacated and the case is remanded to the Ninth Circuit for further consideration in light of the Social Security Disability Reform Act of 1984.

DATED: November 27, 1984

Respectfully submitted,

Laurence H. Tribe

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CERTIFICATE OF SERVICE

PURSUANT TO SUPREME COURT RULE 28.5(b)

I am a member of the Bar of the United States Supreme Court, am one of the attorneys representing the individual plaintiffs below and the respondents herein in Docket No. 84-115. I have filed a notice of appearance in this matter in connection with the respondents' opposition to petitioner's application for stay pending filing of petition for certiorari.

I served the respondent herein by mailing via prepaid United Parcel next-day mail to go out on November 28, 1984, the following document:

Three copies of Respondents'
Supplemental Brief

addressed to counsel of record as follows:

The Hon. Rex E. Lee
Solicitor General
Department of Justice
Washington, D.C. 20530

Attn: Ed Kneedler

I swear under penalty of perjury that the foregoing is true and correct.

Executed this 27th day of November, 1984, in the County of Los Angeles, State of California.

Marilyn Holle

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